WELLS J. HORVEREID

IBLA 84-921 Decided September 24, 1985

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, declaring lode mining claims not abandoned and void. NM MC 43294, NM MC 43295.

Affirmed.

1. Evidence: Presumptions -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

   The inference that evidence of assessment work was not timely filed with the Bureau of Land Management (BLM) arising from the absence of such a document from the case file coupled with the presumption that BLM officials have not lost legally significant documents filed with BLM may be overcome by probative evidence to the contrary.

2. Evidence: Burden of Proof -- Rules of Practice: Appeals: Burden of Proof

   The burden of proof is on an appellant to show error in the decision appealed from and, in the absence of such a showing, the decision will be affirmed.

3. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Title

   With respect to disputes between rival mining claimants concerning which claimant has the superior right to possession of a claim, a court of competent jurisdiction is the proper forum.

APPEARANCES: Wells J. Horvereid, pro se; F. B. and Irene Franklin, pro sese; Cecilia Ann Duncan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Wells J. Horvereid has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated July 31, 1984, rejecting appellant's protest and finding the Franklin No. 1 Mine and the Franklin

No. 2 lode mining claims, NM MC 43294 and NM MC 43295, were not abandoned and void for failure to file with BLM either evidence of annual assessment work or notice of intention to hold the claims pursuant to section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1982).

The Franklin No. 1 Mine and No. 2 mining claims were located January 18, 1979, by F. B. and Irene Franklin in Sierra County, New Mexico. The notices of location for these claims were recorded with BLM on January 22, 1979, pursuant to section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1982). Between 1980 and 1982, the Franklins filed timely with BLM proofs of labor with respect to the claims pursuant to section 314(a) of FLPMA. However, the record contains no copy of annual assessment work or notices of intention to hold the claims filed with BLM during 1983.

On March 22, 1984, BLM received a letter from appellant which stated that, after "extensive checking with records in your office," appellant had determined the Franklins had "abandoned" their claims by failing to file a proof of labor with BLM on or before December 30, 1983, as required by 43 CFR 3833.2-1. Appellant further stated he had top-filed the claims. Indeed, on April 6, 1984, appellant filed for recordation with BLM copies of notices of location for the Foundation Nos. 1 and 2 lode mining claims, NM MC 130156 and NM MC 130157. The record indicates these claims were originally located on March 11, 1984, and amended on March 22, 1984. By letter dated March 20, 1984, appellant informed the Franklins of his top-filing.

By letter dated March 30, 1984, BLM responded to appellant's March 22 letter, stating, with respect to the Franklin's mining claims, "[o]ur records do not show a proof of labor filing for 1983." However, BLM stated that it could not declare the claims abandoned and void pursuant to section 314 of FLPMA, 43 U.S.C. § 1744 (1982), because the constitutionality of that statutory provision was "before the U.S. Supreme Court." BLM was referring to United States v. Locke, 105 S.Ct. 1785 (1985), which was recently decided by the Supreme Court. That decision upheld the constitutionality of the statute.

On April 9, 1984, BLM received a letter from the Franklins, which stated that they had recorded their proof of labor for the 1983 assessment year with the Sierra County recorder on August 19, 1983, and "mailed [it] to your office a few days later." The Franklins also submitted a number of affidavits in support of their assertion that the proof of labor had been mailed to BLM. In an affidavit dated March 29, 1984, Lily C. Montoya, the Sierra County Clerk, stated Ms. Franklin had recorded a proof of labor for the Franklin claims and several other claims on August 19, 1983, and "was given a large manila envelope in which to mail these, [which was] addressed for mailing to you." In another affidavit, Patricia Ogden stated Ms. Franklin "made out her proof of labor papers" and then "mailed" them a day or so later in her presence. Finally, in an affidavit dated April 2, 1984, Sonja Rutledge, postmaster, Hillsboro, New Mexico, stated that in August 1983, Ms. Franklin and Ms. Ogden "mailed to the BLM" by certified mail, no return receipt requested, some "mining papers," including proofs of labor.

On April 6, 1984, appellant formally filed a "protest," challenging the validity of the Franklin's mining claims on the basis that the location

of the claims had been moved on the ground 800 feet to the west and that no amended location notice had been filed with BLM to reflect this fact. Appellant requested that BLM declare the claims null and void and the ground subject to the claims be found open to location by appellant.

By memorandum dated May 1, 1984, BLM requested the advice of the Field Solicitor, Santa Fe, New Mexico, regarding whether the Franklin's mining claims were abandoned and void for failure to file timely proofs of labor for the year 1983. BLM also stated: "We have searched our records and have been unable to locate any documents filed by the Franklins on or before December 30, 1983."

By memorandum dated July 11, 1984, the Field Solicitor informed BLM that he had concluded that the affidavits submitted by the Franklins "establish to my satisfaction that copies of the recorded proofs of labor were in fact mailed to the BLM in August of 1983 and received by it, but lost. Therefore, the proofs of labor were filed as required."

In its July 1984 decision, BLM concluded that the Franklins had submitted sufficient proof that they had timely filed with BLM a proof of labor for the 1983 assessment year with respect to the Franklin No. 1 Mine and No. 2 mining claims and essentially rejected appellant's protest. BLM named appellant as an adverse party to its decision. Appellant filed an appeal from that decision.

In his statement of reasons for appeal, appellant contends there is insufficient proof the Franklins timely filed the 1983 proof of labor with BLM. In a reply to appellant's statement of reasons, the Franklins reiterate their assertion that the proof of labor was mailed to BLM in August 1983 and contend they had no intention to abandon the claims involved herein, having spent a considerable amount of money exploring for "ore." Similarly, in a reply to appellant's statement of reasons, the Field Solicitor argues, on behalf of BLM, that there is substantial countervailing evidence that the Franklins timely filed the 1983 proof of labor, thereby overcoming the presumption that BLM employees properly discharged their duties and did not lose or misplace the documents, citing Bruce L. Baker, 55 IBLA 55 (1981).

[1] Under section 314(a) FLPMA, 43 U.S.C. § 1744(a) (1982), the owner of an unpatented mining claim located after October 21, 1976, must "file" with BLM either evidence of annual assessment work or a notice of intention to hold the claim "prior to December 31 of each year following the calendar year in which the said claim was located." Accordingly, the Franklins were required to file a notice of intent to hold or their proof of labor for 1983 with respect to the Franklin No. 1 Mine and No. 2 mining claims prior to December 31, 1983. Failure to file the required instrument in accordance with the statute "shall be deemed conclusively to constitute an abandonment of the mining claim * * * by the owner." 43 U.S.C. § 1744(c) (1982). In such circumstances, the claim is thereby rendered "void." 43 CFR 3833.4(a). It is well established that section 314 of FLPMA is self-operative and does not depend upon any act or decision by an administrative official. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981).

The Franklins, however, assert they complied with the statutory filing requirement by mailing the 1983 proof of labor, previously filed with the

county, to BLM in August 1983, well before the statutory deadline. In its July 1984 decision, BLM accepted the affidavits submitted by the Franklins as sufficient evidence that the 1983 proofs of labor were mailed by them and received by BLM, as required under 43 CFR 3833.0-5(m). In essence, BLM concluded the Franklins had rebutted the evidence that they were never received arising from the absence of the documents from the record and the presumption that BLM had not lost or misplaced legally significant documents filed with it. See generally S. H. Partners, 80 IBLA 153 (1984), and cases cited therein; Bruce L. Baker, supra.

[2] It is undoubted that the Department had authority to decide whether a particular mining claimant has complied with the statute in determining whether or not that claimant has abandoned his claim by virtue of the statutory presumption, such that the paramount Government title is no longer encumbered. See Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969). While we are constrained by neither the opinion offered by the Solicitor to BLM nor the conclusion reached by BLM, we find the decision appealed from is supported by the record. The burden of proof is on appellant to show error in the decision appealed from and, in the absence of such a showing, the decision under appeal will be affirmed. United States v. Connor, 72 IBLA 254 (1983). Appellant has not tendered any evidence which would give rise to a finding of error.

[3] To the extent appellant is challenging the Franklin's claims on the basis that they were allegedly moved on the ground in derogation of appellant's rights pursuant to his conflicting locations, we must find that the case is governed by 30 U.S.C. § 30 (1982), which provides that disputes between adverse mining claimants shall be decided in a "court of competent jurisdiction," and not by the Department. Where rival claimants are involved, the ultimate question for adjudication is the "right of possession" between the claimants, which is outside the scope of Departmental adjudication. 30 U.S.C. § 30 (1982); see Duguid v. Best, 291 F.2d 235 (9th Cir. 1961), cert. denied, 372 U.S. 906 (1963). A suit filed in a court of competent jurisdiction is the proper means of resolving such a dispute as to the right of possession. W. W. Allstead, 58 IBLA 46 (1981).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

R. W. Mullen
Administrative Judge